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OAG 16-011

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Subject: Whether a public agency may expunge records under a court order consistent with the Open Records Act

Requested by: Lisa Lang, General Counsel
Education Professional Standards Board

Written by: Matt James

Syllabus: Courts have the authority to order expungement of a public agency's records under certain circumstances. An agency subject to an expungement order should seal the records, delete all references to the records in computer systems and indexes, and respond to inquiries for the records that the records do not exist. Public agencies should not destroy the records subject to expungement, but should maintain them consistent with the appropriate records retention schedule unless otherwise ordered by a court.

Statutes construed: KRS 17.142; KRS 431.073; KRS 431.076; KRS 431.078

OAGs cited: 07-ORD-060; OAG 82-588

Opinion of the Attorney General

Lisa A. Lang, General Counsel for the Education Professional Standards Board ("EPSB"), has asked several questions of this office pertaining to expungement of records:

1. Do Kentucky courts have the authority to order a public agency . . . to "expunge" records in the public agency's possession?

2. Assuming that Kentucky courts do have the authority to order a public agency . . . to “expunge” records within the public agency’s possession, would that public agency be required to destroy those records or simply segregate those records from those available for public inspection under Kentucky’s Open Records Act?
3. If the public agency . . . destroys the records in an effort to comply with a court’s expungement order, would that public agency be in violation of Kentucky law by destroying the records before the date provided for in the public agency’s retention schedule?

Specifically, Ms. Lang requests clarification in light of the context of our open records decision in 07-ORD-060 and the recent passage of H.B. 40, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016) (“H.B. 40”). We advise that: 1) courts have the authority to order the expungement of records of public agencies; 2) public agencies subject to expungement orders are required to seal the records, delete references to the records from their computer systems, and respond to requests for such records that they do not exist; and 3) public agencies should maintain expunged records consistent with the appropriate records retention schedules unless otherwise ordered by a court.

H.B. 40 created a new section, codified at KRS 431.073, allowing for the expungement of certain Class D Felonies, and specified the procedures for such expungements. It also amended KRS 431.076 to allow for expungement of felony cases which did not result in an indictment. KRS 431.073(6) provides:

Upon entry of an order vacating and expunging a conviction, the original conviction shall be vacated and the record shall be expunged. The court and other agencies shall cause records to be deleted or removed from their computer systems so that the matter shall not appear on official state-performed background checks. The court and other agencies shall reply to any inquiry that no record exists on the matter

After the enactment of H.B. 40, records pertaining to certain felonies may be expunged. KRS 431.076 also allows for the expungement of criminal records where the person is found not guilty or not indicted, and KRS 431.078 allows for the expungement of certain misdemeanors and traffic violations.

In 07-ORD-060, we addressed the various procedures available for expungement and segregation of records. The requester in that decision sent an open records request to a correctional facility for "a copy of the tape of an adjustment committee hearing." *Id.* The correctional facility denied the request under KRS 197.025(5), which provides that "KRS 61.870 to 61.884 to the contrary notwithstanding, all records containing information expunged pursuant to law shall not be open to the public." The correctional facility argued that the hearing had been voided by the warden under CPP [Corrections Policies and Procedures] 15.6, incorporated in 501 KAR 6:020, and that "the term 'void' is a synonym for 'expunged.'" 07-ORD-060. We held that the correctional facility had violated the Open Records Act in that "*neither CPP 15.6, II.F.5.d. nor 15.6, II.D.4. authorize the expungement of a record.*" 07-ORD-060. We noted that the correctional facility "has cited no specific legal authority supporting its position that the terms 'void' and 'removal' are synonymous with the term 'expungement,' and we respectfully decline to treat these terms interchangeably. Expungement is an extraordinary legal device by which we are permitted 'to indulge the fiction' that a record does not exist" *Id.*

In support of our decision in 07-ORD-060 that express statutory authority was required for expungement, we relied in part on OAG 82-588, in which we addressed the enactment of KRS 17.142 requiring law enforcement agencies to "segregate all records relating to the arrestee in its files in a file separate and apart from those of convicted persons" if certain conditions are met. KRS 17.142(1). We advised that "KRS 17.142 . . . settles the question as to the expungement of police records by order of a court and mandates that the records are not to be expunged but 'segregated.'" OAG 82-588. We noted that "prior to the enactment of this statute there was not in effect in Kentucky a statute giving general power to courts to expunge police records," and that "the legislature has now specifically fixed the public policy against expungement by providing for the segregating of police records." *Id.* At the time of OAG 82-588, there were no procedures available for expungement in Kentucky, only for the segregation of records, and we advised that segregation of records was distinct from expungement.

Subsequent to the enactment of KRS 17.142 and OAG 82-588, the legislature enacted KRS 431.078, 1992 Ky. Acts 937, which allows for the expungement of certain misdemeanor records, KRS 431.076, which allows for expungement of

records of allegations for which a person is not indicted or found not guilty, 1996 Ky. Acts 1858, as well as other statutes providing for expungement in more limited contexts. In 07-ORD-060, we distinguished between the segregation procedures by KRS 17.142 and the subsequent enactments of express authority for expungement. "A cursory review of Kentucky Revised Statutes confirms the presence of a number of provisions containing an *express grant* of authority to expunge." 07-ORD-060 (discussing KRS 161.795, 311.275, 313.600, 315.121, 320.310, 431.076, 431.078, 510.300, and 610.330). We concluded that "KRS 197.025(5) authorizes nondisclosure of 'records containing information *expunged pursuant to law*,' and CPP 15.6 is not a law that authorizes expungement." 07-ORD-060.

In 07-ORD-060, we did not hold that records subject to expungement by court order under KRS 431.076 or similar statutes must be segregated and not expunged. Instead, we were addressing the much narrower issue of whether CPP 15.6 authorizes the Department of Corrections to expunge records. We found that it did not, as expungement requires express statutory authorization, using KRS 17.142 as an example of where that express authorization was not given. Express authorization for expungement is found in KRS 431.073, 431.076, 431.078, and other statutes. These statutes and procedures are distinct, and which procedures an agency must use depends on under which statute the court order was granted.¹

¹ In *Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky. Ct. App. 2006), the court explained the distinction between segregation under KRS 17.142 and expungement under KRS 431.076:

KRS 17.142(1) permits the segregation of records in the hands of public agencies Court records do not fall within the purview of the segregation statute.

Mr. Shouse sought to have his record expunged under KRS 431.076, which is available to a "person who has been charged with a criminal offense and who has been found not guilty of the offense, or against whom charges have been dismissed with prejudice. . . ." By its own terms, the statute applies to all records, including court records. To summarize the distinction between the two statutes, segregation applies to "dismissed" cases and does not affect court records; expungement requires that a case be "dismissed with prejudice" and seals court records.

Turning to the specific questions asked, KRS 431.073 and other statutes expressly authorize courts to order the expungement of records "in the custody of any other agency or official." KRS 431.073(4). *See also* KRS 431.076(4); KRS 431.078(5); *McNabb v. Ky. Educ. Profl Standards Bd.*, No. 2013-CA-000601-MR, 2015 WL 5096007, at *5 (Ky. Ct. App. Aug. 28, 2015) ("KRS 431.076 makes it clear that a circuit court has authority to order law enforcement agencies, and 'any other agency' including the EPSB, to expunge all 'records relating to the arrest, charge, or other matters arising out of the arrest or charge[.]'"'). A court may thus order the expungement of records in the possession of any public agency.

If those records are ordered expunged, KRS 431.073(6) provides that "the court and other agencies shall cause records to be deleted or removed from their computer systems so that the matter shall not appear on official state-performed background checks. The court and other agencies shall reply to any inquiry that no record exists on the matter." *See also* KRS 431.076(6); KRS 431.078(6). However, expungement of records does not require destruction of the records unless ordered by the court. The Kentucky Department for Libraries and Archives' DESTRUCTION OF PUBLIC RECORDS: A PROCEDURAL GUIDE specifies the procedures to be used for expungement orders:

In certain instances, Kentucky law allows for the courts, or other administrative bodies, to order that records be expunged, or sealed. In most cases, when the courts order that record(s) be expunged, the agency holding the records can delete all references to the record(s) in question and may legally deny their existence. The agency is then required to protect that record in such a way that prohibits the information from disclosure. There are instances in which the court could order the record to be reopened at a later date. While the expungement order affects access to the record(s) in question, agencies should continue to follow the retention period listed in the appropriate Records Retention Schedule, unless ordered differently by the court.

KY. DEP'T. FOR LIBRARIES & ARCHIVES, DESTRUCTION OF PUBLIC RECORDS: A PROCEDURAL GUIDE 7 (Sept. 2007). *See also* *Commonwealth v. Shouse*, 183 S.W.3d

204, 205 (Ky. Ct. App. 2006) ("Expungement . . . seals court records."). Public agencies subject to expungement orders from courts should seal the records, remove references to the records from computer systems and indexes, and respond to inquiries for the records that no records exist on the matter. Agencies should not destroy the records unless the expungement order so specifies, as a court may order the record to be reopened at a later date, and the agency should continue to follow the appropriate records retention schedule. Should the expungement order require that the records in question be destroyed, an agency should comply with that order regardless of the applicable records retention schedule.

In summary, Kentucky courts have been given the statutory authority to order the expungement of records in certain circumstances. Public agencies subject to an expungement order should seal the records, delete references to the records in computer systems and indexes, and respond to inquiries for the records that the records do not exist. Public agencies should not destroy the records subject to expungement, but should seal them continue to retain them consistent with the applicable records retention schedule unless a court orders otherwise.

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A handwritten signature in cursive script that reads "Matt James".

Matt James
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